(1) Supreme Court, U.S.
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No. _____

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In The
Supreme Court of the United States

WILLIAM A. COHN,
Petitioner,

v.

BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

PETITION FOR A WRIT OF CERTIORARI

William A. Cohn,- *Petitioner, pro se*
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QUESTIONS PRESENTED

1) Whether the Supreme Court of the state of Tennessee has the authority to overrule a holding in a *Final Order* of a *Federal* Court under ***Article VI, Clause 2*** of the ***Constitution of the United States of America.***

2) Whether the Supreme Court of the state of Tennessee engages in practices in its Disciplinary procedures for the lawyers it governs which *violate* the *Due Process Clauses* of the ***5th*** and ***14th Amendments*** to the ***Constitution of the United States of America***.

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PETITION FOR A WRIT OF CERTIORARI

William A. Cohn, petitioner, pro se, respectfully petitions for a Writ of Certiorari to review the decision of the Supreme Court of Tennessee in this case.

OPINIONS BELOW

The opinion of the Supreme Court of the state of Tennessee is reported at *2004 WL 2659037*.

JURISDICTION

The Supreme Court of Tennessee entered its judgment on November 22, 2004, and denied the petitioner's petition for Rehearing on December 14, 2004. The jurisdiction of this Court is invoked under *28 USC 1257(a)* as a right or privlege is claimed under the *Constitution of the United States*.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The *Constitution of the United States of America* provides as follows:

Article 6:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; ...***shall*** be the ***supreme law*** of the land; and the ***judges*** in ***every state shall*** be *bound* thereby, anything in the Constitution or laws *of any state* to the contrary *notwithstanding.*"

Amendment 5:

"No person shall ... be deprived of life, liberty, or property, without due process of law;..."

Amendment 14, Section 1:

"... No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Appellant William A. Cohn is a lawyer who was practicing in the United States Bankruptcy Court for the Western District of Tennessee. The Bankruptcy Court constructed an environment consistent with a high volume of filings and coerced lawyers to conduct themselves consistent with its examples. The lead of the Bankruptcy Court was exemplified by the Bankruptcy Court's open and wilful failure to follow law mandated by the United States Court of Appeals for the 6th Circuit. The two most salient examples of this conduct were the Bankruptcy Court's failure to follow In RE: Boddy, 950 F.2d 334 (CA 6, 1991) a case mandating the award of debtors' attorney fees in Chapter 13, and In RE: Chavis, 47 F.3d 318 (CA6, TN, 1995), a case mandating the *dis*allowance of *post confirmation* proofs of claim in Chapter 13.

The Bankruptcy Court *allowed* debtor's lawyers to file Proofs of Claim for legal services for *pre* petition *non* Bankruptcy work, *pre* petition *Bankruptcy* work, and *post* confirmation *non* Bankruptcy work.

The Appellant lawyer began filing proofs of claim for *post* confirmation *Bankruptcy* work, The Chapter 13 Trustee and his staff ***knew*** of the filings *from the very beginning* and did **not** file an objection to any of the claims for seven (7) years. The appellant lawyer *relied* on said non filings of objections as acceptance of the propriety of the proofs of claim. These proofs of claim were filed as regular unsecured claims, and *not* as administrative claims, so the lawyer received the same percentage as other unsecured debts.

Debtors ***received notice*** of the filing of each such proof of claim directly from the Bankruptcy Court, and said notice had the *signature* of the Bankruptcy *Judge*. Each such notice ***contained instructions*** as to what the debtor should do if the debtor disagreed. The Bankruptcy Court *would accept* a *mere handwritten note* from any such affected debtor *as an objection* and would then set a hearing. This is the same procedure which

was followed for all post petition proofs of claim.

Had the Bankruptcy Court properly followed the United States Court of Appeals for the Sixth Circuit's decision in In Re: Chavis, supra, no post confirmation proofs of claim would have been allowed at that time, and certainly not the petitioner's. This issue would never have arisen as the Sixth Circuit had made it clear in *In Re: Chavis, supra* that NO post confirmation proofs of claim may be allowed after the 90 day bar date has expired.

Some of the cases in which proofs of claim were filed were paid out and the Bankruptcy Court issued a Final Order entitled "Final Order of Discharge" which approved all of the procedures and proofs of claim filed in the debtor's chapter 13 plan and which finalized the debtor's discharge. The Bankruptcy Court is a Federal Court. The closed cases were never re-opened by the Bankruptcy Court.

The Chapter 13 Trustee then filed objections to the proofs of claim which were pending in the open, active chapter 13 cases. The Bankruptcy Court upheld the objections, while also finding that the Chapter 13 Trustee was at fault and, also finding that, to a certain extent, the Bankruptcy Judge himself was also at fault. The Appellant/Lawyer appealed the Order upholding the objections. The lawyer/appellant and the Chapter 13 Trustee reached a settlement which was approved by the Bankruptcy Court.

The Bankruptcy Judge then sent a letter to the Disciplinary Board. A disciplinary proceeding was commenced.

The Disciplinary Board, *through its* Disciplinary Counsel, *appointed* a hearing *panel* with**out** the presence of the appellant/lawyer or his counsel. The Disciplinary Counsel then **gave an orientation** to the hearing *panel members* with**out** the presence of the appellant/lawyer or his counsel.

The hearing panel consisted of *no* lawyers with any *experience* in Bankruptcy Court, nor had any of the lawyers had a disciplinary petition filed against them.

The Constitutional issues as to Due Process rights were

raised in the pleadings via Motions to Dismiss.

A hearing ensued in which only one non partisan Expert witness testified (in addition to a handful of partisan witnesses). The Expert witness testified that the appellant /lawyer acted in good faith attempting a good faith extension of the Law. The Chapter 13 Trustee testified that the Appellant/Lawyer made it clear what he was doing and did not try to hide anything.

The hearing panel found against the lawyer and ordered monies received from the closed cases to be refunded to the Bankruptcy Court (which the lawyer did). The hearing panel ordered a public censure. The Hearing Panel did not segregate the penalty phase from the guilt phase, and introduced evidence of prior private admonitions in the case in chief.

The Appellant/Lawyer appealed to the Chancery Court. The Disciplinary Board then proffered an independent, expert witness who testified that, indeed, the lawyer/appellant had ***NOT*** VIOLATED *RULE 11* of the *Rules of Civil Procedure*, and that the lawyer/appellant had indeed made an effort for a good faith extension of the law.

The Chancery Court reversed to the extent that the Chancery Court found that the appellant/lawyer did ***not*** act *surreptitiously*.

The Appellant /Lawyer appealed to the Supreme Court of Tennessee. The Supreme Court of Tennessee reversed the Chancery Court, affirmed the hearing panel, and ordered a 90 day suspension in lieu of a public censure, basically because the lawyer/appellant had 4 private admonitions from the Disciplinary Board (one of which was for failing to properly include a disclaimer in an ad, a regulation which was later repealed by the Tennessee Supreme Court itself). Constitutional issues as to Equal Protection were raised at the Chancery Court proceedings and in the Tennessee Supreme Court briefs. The Tennessee Supreme Court failed to address all of the appropriate statutes and did not address any of the Constitutional issues appropriately.

REASONS FOR GRANTING THE WRIT

A. The Supreme Court of the State of Tennessee has decided an important federal question in a way that conflicts with relevant decisions of this Court.

The Supreme Court of the State of Tennessee failed to honor and follow a Final Order of a Federal Court, an act which has been proscribed by the *Constitution of the United States, Article 6*, and by this Court.

Some of the cases in which proofs of claim were filed were paid out and the Bankruptcy Court issued a Final Order entitled "Final Order of Discharge" which approved all of the procedures and proofs of claim filed in the debtor's chapter 13 plan and which finalized the debtor's discharge. The Bankruptcy Court is a Federal Court. This Final Order affirmed that all proofs of claim were validly filed.

The Tennessee Supreme Court ruled that the proofs of claim were NOT validly filed, and ordered all funds received to be returned to the Court Clerk, which the petitioner did.

The state Supreme Court is made up of state judges, and their such ruling is ***specifically prohibited*** by *Article 6* of the *Constitution of the United States*, which says that "...the laws of the United States ...***shall*** be the ***supreme law*** of the land; and the ***judges*** in ***every*** *state* ***shall*** be *bound* thereby, anything in the ...Constitution or laws *of any state* to the contrary *notwithstanding.*"

The Bankruptcy Court rulings are based on the *Bankruptcy Code*, a part of the *United States Code*, specifically *Title 11*, and Bankruptcy powers are granted to the *Federal* government in the *Constitution of the United States*. It has long been held by this Court that state laws must yield whenever Congress, in exercise of powers granted to it, legislates precise subject matter, inasmuch as the state's police power is subordinate to those conferred on the Federal government by the *Constitution*. *Gulf, C. & S.F.R. Co. v. Hefley*, 158 US 98, 39 L

Ed 910, 15 S Ct 802 (1895).

Even if Congress has not completely foreclosed state legislation in a particular area, a state law or ruling is void to the extent that it actually conflicts with a valid federal law or ruling, and a conflict will be found where state law stands as obstacle to accomplishment and execution of full purposes and objectives of Congress. *Ray v. Atlantic Richfield Co.*, 435 US 151, 55 L Ed 2d 179, 98 S Ct 988 (1978).

The purpose of and objective of Congress in creating a Final Order of Discharge was to bring an end to litigation of all matters involved in those claims of the Bankruptcy Estate unless the case is timely re- opened to litigate the claims. The closed cases have never been re-opened, and over 7 years has transpired since the last case was closed.. This purpose and objective was previously recognized and affirmed in *In RE: Sheldon's, Inc. of Maine*, 28 BR 568, 10 BCD 450, CCH Bankr L Rptr 69216 (BC DC Me, 1983).

At least one state Supreme Court has recognized and affirmed this position in regard to Bankruptcy. *In RE: Batali*, 98 Wash 2d 610 657 P2d 775 (Wash, 1983).

The Supreme Court of the state of Tennessee clearly acted in contravention to decisions of this Court and should be reversed.

B. The Supreme Court of the state of Tennessee has decided an important federal question in ways that conflict with the decision of a United States court of appeal.

1) The Supreme Court of the state of Tennessee restricted due process rights of the petitioner contrary to the decisions of the appellate courts of the United States by appointing members of the Hearing Panel to hear the case and then having its own lawyers to perform an orientation lecture to the Hearing Panel members, and further by failing to appoint members of the Hearing Panel to hear the case who had any knowledge of Bankruptcy Law, Procedures, and Customs, a complicated and byzantine area of the law.

The Supreme Court of Tennessee appoints the Board of Professional Responsibility (which is charged with overseeing lawyer discipline in the state of Tennessee) and also appoints the lawyers in the Office of the Disciplinary Counsel, who are the lawyers for the Board of Professional Responsibility, who advise said Board, and who also stage an Orientation session for members of the Hearing Panels (for lawyer discipline hearings) which the said Board appoints.

The conflict of interest is clear. There is *no less* than an appearance of a creation of a *presumption* of *correctness*, (and perhaps *not even just the appearance)* by the Disciplinary Counsel's conducting of the Orientation. This is a deleterious effect. Due Process has to do with the denial of fundamental fairness, shocking to the universal sense of justice, and deals with the exercise of power and jurisdiction. *Kinsella v. United States*, 361 US 234, 4 L Ed 2d 268, 80 S Ct 297 (1960). The judicial department of government is necessarily governed in exercise of its functions by due process of law. *Hovey v. Elliott*, 167 US 409,

42 LEd 215, 17 S Ct 841 (1897) (ovrld on other grounds as stated in *Phoceene Sous- Marine, S.A. v. U.S. Phosmarine, Inc*. (CA9, Cal, 1982) 682 F.2d 802, 34 FR Serv.2d 951).

There was no opportunity to challenge the procedure of the Orientation. The petitioner was not allowed to have representation present at said Orientation. To make out a prima facie claim of denial of due process, one must establish: 1) that their liberty or property interests were invaded by government without opportunity to challenge that invasion; and 2) that purported justification for that invasion is at least plausibly disputable. *Jacobson v. Tahoe Regional Planning Agency*, 558 F2d 928 (CA9, Cal, 1977) op replaced 566 F2d 1353 (CA9, Cal, 1977), affd in part and revd on other grounds in part 440 US 391, 59 LEd2d 401, 99 SCt 1171 (1979). Both elements have been established in this case.

The Due Process Clause of the *Fifth Amendment* entitles persons to an impartial and disinterested tribunal in both civil and criminal cases, since the requirement of neutrality in adjudicative proceedings safeguards two central concerns of procedural due process: prevention of unjustified or mistaken deprivations and promotion of participation and dialogue by affected individuals in the decision making process. Since the neutrality requirement helps to guarantee that no person will be deprived of interests without a proceeding in which *he has assurance* that the *arbiter* is *not predisposed* to find against him, the ***stringent*** rule that justice must satisfy the appearance of justice ***must*** be applied, although it may sometimes bar a trial by judges who have no actual bias. *Marshall v. Jerrico, Inc*. 446 US 238, 64 L.Ed.2d 182, 100 SCt 1610 (1980).

What was the effect of this?

The Chapter 13 Trustee *testified* at page 356 of the transcript that knowledge of the Petitioner's practice of filing post confirmation proofs of claim *came to the attention* of the Chapter 13 Trustee *in 1991*, when the claims were brought to the Trustee's attention *by his employees* in his office.

The Hearing Panel found that the filing was

"surreptitious."

The Supreme Court of Tennessee in a rubber stamp decision called the filing "surreptitious."

Numerous other instances of *findings without factual basis* exist in the record, (including a finding that the petitioner did not comply with *11 USC 329*, when in fact the *Section 329* disclosure *clearly set out* the *existence* of a *written* contract which was attached to the petition until the Bankruptcy Judge asked the Petitioner to stop filing the contract).

Was there ever a clearer example of an undue influence resulting in a denial of due process?

The Supreme Court of the state of Tennessee clearly acted in contravention to decisions of this Court and should be reversed.

2) The Supreme Court of the state of Tennessee restricted due process rights of the petitioner contrary to the decisions of the appellate courts of the United States by *refusing* to allow the petitioner *to utilize statutes* of the United States of America.

The petitioner utilized two *statutes* of the United States of America. *11 USC 1305* allows proofs of claims to be filed for services rendered to the debtor after confirmation in a Chapter 13 Bankruptcy. *11 USC 502(b)(4)* allows the filing of proofs of claim for attorney fees in Bankruptcy Court. The state Supreme Court disagreed with the INTERPRETATION of these statutes. There was *no* definitive case, *no* local rule, *no* standing Order of the Court, and *no* Rule of Procedure, prior to the filing of any of the proofs of claim which did not allow the procedure utilized by the petitioner. In point of fact, the Tennessee Supreme Court *mis-* applied *11 USC 329* in its ruling. It is not consonant with due process to require a person torefrain from a wholly lawful activity pursuant to their *Due Process Rights*. *Louisiana ex rel Gremillion v. NAACP*, 366 US 293, 6 L Ed 2d 301, 81 S Ct 1333 (1961).

The Supreme Court of the state of Tennessee clearly acted in contravention to decisions of this Court and should be reversed.

3) The Supreme Court of the state of Tennessee restricted due process rights of the petitioner contrary to the decisions of the appellate courts of the United States by failing to acknowledge independent evidentiary expert testimony.

The respondent Board did not present its only independent expert witness until after the Hearing Panel's opinion was issued, and then only after the appeal process was commenced. The first to hear said testimony was the Chancellor on appeal. The Supreme Court of the state of Tennessee *never addressed* the new testimony. The Tennessee Court clearly *did not consider* the new evidence. The evidence was UNCONTROVERTED by any independent, non partisan witness. The new testimony stated that the petitioner did NOT violate Rule 11 of the Rules of Procedure. In other words, the *Board's* expert testified that the petitioner made a *good faith effort* to utilize existing law or to obtain an extension of existing law.

Such failure to consider evidence is a denial of due process.

Orders are *void* if the finding is contrary to the indisputable character of the evidence, or if facts found do not, as a matter of law, support the Order made. *Interstate Commerce Com. v. Louisville & N.R. Co.*, 227 US 88, 57 L.Ed. 431, 33 SCt 185 (1913).

The Supreme Court of the state of Tennessee clearly acted in contravention to decisions of this Court and should be reversed.

4) The Supreme Court of the state of Tennessee restricted due process rights of the petitioner contrary to the decisions of the appellate courts of the United States by allowing introduction of penalty phase evidence during the case in chief.

The Supreme Court of the state of Tennessee allowed introduction in the case in chief of minor private admonitions which had no relation to the conduct of which the petitioner was charged in the proceeding. Where there is no consistency of the prior private admonitions, and no relation to the instant charged conduct to the conduct in the prior private admonitions, such penalties cannot be admitted in the case in chief. *Dowling v. United States*, 493 US 342, 107 L.Ed.2d 708, 110 SCt 668, 29 Fed Rules Evid Serv 1 (1990).

The Supreme Court of the state of Tennessee clearly acted in contravention to decisions of this Court and should be reversed.

5) The Supreme Court of the state of Tennessee restricted equal protection rights of the petitioner contrary to the decisions of the appellate courts of the United States by failing to charge as co defendant the Chapter 13 Trustee who was delineated as also at fault in this case.

Both the Supreme Court of the state of Tennessee and the United States Bankruptcy Court for the Western District of Tennessee affirmed that the Chapter 13 Trustee was also at fault in this matter. However, neither charged the Chapter 13 Trustee with misconduct even though the Board was asked to do so.

This means that a co defendant was absolved from guilt and the petitioner as co defendant was made to shoulder all of the blame. This denied the petitioner not only Due Process Rights, but

also the right to be equally treated under the *Equal Protection Clause* of the *Fourteenth Amendment* to the *Constitution of the United States*.

The Equal Protection Clause of the Constitution of the United States means that the rights of all persons must rest upon the same rule under similar circumstances, and it applies to the exercise of all powers that can affect an individual. *Louisville Gas & Electric Co. v. Coleman*, 277 US 32, 72 L.Ed.770, 48 SCt 423 (1928). The purpose of the Equal Protection Clause is to secure every person against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through its duly authorized agents. *Sunday Lake Iron Com v. Wakefield*, 247 US 350, 62 L.Ed.1154, 38 S.Ct.495 (1918). Equal Protection emphasizes disparity in treatment by the state between classes of individuals whose situations are arguably indistinguishable. *Ross v. Moffitt*, 417 US 600, 41 L.Ed.2d 341, 94 S.Ct.2437 (1974).

The Supreme Court of the state of Tennessee clearly acted in contravention to decisions of this Court and should be reversed.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted and a stay issued enjoining enforcement of the suspension heretofore ordered..

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APPENDIX

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON.
April 7, 2004 Session

WILLIAM A. COHN v. BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE

Direct Appeal from the Chancery Court for Shelby County
No. CH-02-1099-1 J. Steven Stafford, Chancellor

W2003-01516-SC-R3-CV - November 22, 2004

E. RILEY ANDERSON, J. delivered the opinion of the Court, in which FRANK F. DROWOTA, III, C.J., and ADOLPHO A. BIRCH, JR., JANICE M. HOLDER, and WILLIAM M. BARKER, JJ., joined.

William A. Cohn, Memphis, Tennessee, Pro Se.

Jesse D. Joseph, Nashville, Tennessee, for the Appellee, Board of Professional Responsibility.

OPINION

BACKGROUND

In 1998, the Board of Professional Responsibility of the Supreme Court of Tennessee ("BPR" or the "Board") filed a disciplinary petition against the appellant, William A. Cohn. The petition was based on a United States Bankruptcy Court's finding that Cohn, an experienced bankruptcy attorney, had improperly collected attorney's fees from 1991 to 1998 by filing creditors' "proofs of claim" pursuant to 11 U.S.C. § 1305 rather than by filing detailed

fee requests. The petition alleged that Cohn's actions not only violated federal bankruptcy law, but also violated numerous provisions of the Code of Professional Responsibility applicable to attorneys in Tennessee.

This case has a long history and is set against the somewhat Byzantine backdrop of federal bankruptcy law and procedure. Because some understanding of the bankruptcy procedures at issue is necessary to understand and evaluate Cohn's practices, we begin with a brief explanation of the applicable bankruptcy law.

Chapter 13 Bankruptcy & Attorney's Fees

According to the record, Cohn represented Chapter 13 debtors in the cases at issue. Chapter 13 is a provision of the Bankruptcy Code allowing debt-ridden individuals to reorganize their financial affairs, paying off debt over a period of three to five years. Bankruptcy proceedings are commenced when debtors (or their attorneys) file a plan for repayment of debts with the bankruptcy court. The bankruptcy court approves the plan by "confirming" it. If the debtor successfully completes the payment plan, the debtor receives a discharge of all remaining debt. *See* 11 U.S.C. §§ 1301-07 (2004); *see also* 11 U.S.C. §§ 1321-28 (2004).

As discussed in the testimony before the BPR hearing panel, in bankruptcy proceedings, including those under Chapter 13, the debtor's finances are consolidated into a bankruptcy estate. The estate is overseen by a trustee who, among other duties, approves payments to creditors made out of the estate. The debtor makes periodic payments to the trustee, as established by the court's confirmation order, and the trustee distributes those payments to the creditors in

accordance with the debtor's plan. The trustee's duties include approving proofs of creditor's claims filed under, *inter alia,* section 1305. 11 U.S.C. §§ 1302(b), 704 (2004).

Because the trustee represents the interests of the estate, rather than the interests of the debtor, Chapter 13 debtors are permitted to hire an attorney to represent their personal interests in the bankruptcy proceeding. The attorney's fees are paid out of the estate. The Chapter 13 debtor need not receive permission from the trustee to retain the attorney, but payments to the attorney must be approved by both the trustee and the court. 11 U.S.C. § 330 (2004), 11 U.S.C. § 1302; *see also* 11 U.S.C. § 704(5) (2004); Fed. R. Bankr. P. 2016.

The bankruptcy code contains two provisions dealing specifically with compensation of attorneys. First, section 330 provides that, in a Chapter 13 case, "the court may allow reasonable compensation to the debtor's attorney." 11 U.S.C. § 330(a)(4)(B).[1] Second, section 329 provides that any attorney who represented a debtor in connection with his or her bankruptcy must file "a statement of the compensation paid or agreed to be paid." 11 U.S.C. § 329(a) (2004); *see also* Fed. R. Bankr. P. 2016(a) (requiring that the statement be "detailed"). The Court of Appeals for the Sixth Circuit has held that the code's requirement that attorney's fees be "reasonable" requires courts to engage in a lodestar analysis when approving attorney's fees in Chapter 13 cases. *In re Boddy,* 950 F.2d 334, 337 (6th Cir. 1991) (holding that attorney's fees in bankruptcy cases must be calculated by determining "a reasonable hourly rate for the particular attorney handling the case and then

[1] The full text of these statutes is set forth in the appendix.

multiply[ing] that rate by the reasonable hours worked on the case.").

Testimony before the BPR hearing panel, including that of the bankruptcy judge, the bankruptcy trustee, and two expert witnesses,[2] established that from 1991 to 1998, the normal practice for awarding attorney's fees in bankruptcy cases in the Western District of Tennessee pursuant to sections 329 and 330 was as follows. At the time a debtor retained an attorney to represent him or her, the client and the attorney would agree to a fee for the representation. Then, when the attorney filed the debtor's Chapter 13 case with the bankruptcy court, the attorney would also file a disclosure statement (as required by section 329) setting out the fee agreed upon with the client. If the agreed-upon fee was at or below an amount set by the bankruptcy court as presumptively reasonable (between $700 and $950 at the time of the cases at issue), then the bankruptcy court would approve the fee as a matter of course. That is, the court would not engage in the lodestar analysis required by the Sixth Circuit's *In re Boddy* decision, and so would not require any documentation of the attorney's time spent on the case.[3]

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[2] The hearing panel considered testimony from Western District Bankruptcy Judge William Brown, Chapter 13 Trustee George Stevenson, and expert witnesses Russell Savory, Edgar M. Rothschild III, and Ben G. Sissman. Mr. Savory and Mr. Sissman practice bankruptcy law in the Western District, and Mr. Rothschild practices in the Middle District of Tennessee.

[3] Payment of such attorney's fees is made a "priority" claim against the estate, meaning that the fees would be paid in full over the life of the debtor's Chapter 13 plan. In contrast, in most Chapter 13 plans, payments to unsecured creditors are paid at only a percentage of their face value (e.g., 10% or 25%), depending on the provisions of the debtor's plan.

The testimony also established that this fee was understood to cover the attorney's representation of the debtor throughout the entire course of his or her bankruptcy (that is, for the entire three- to five-year period until discharge). The bankruptcy judge, the trustee, and the expert witnesses all testified before the hearing panel or by deposition that because of the high volume of bankruptcy cases handled by both the Bankruptcy Court for the Western District and the local bankruptcy bar, seeking additional fees was extremely rare. However, the witnesses agreed that if an attorney did wish to apply for additional fees due to unforeseen developments in the bankruptcy case, the general practice was for the attorney to submit detailed time records from the inception of the case pursuant to 11 U.S.C. § 330 and Rule 2016.

Cohn's Billing Method

Rather than applying for a fee only once, at the inception of the Chapter 13 case, Cohn testified before the Board, and the documentary evidence reflects, that his general practice was to divide his bankruptcy representation into two parts. First, he charged his clients an initial fee (i.e., the presumptively reasonable fee) to obtain confirmation of their Chapter 13 plans and submitted that fee to the court as his section 329 disclosure. The record shows that in Cohn's section 329 disclosures, he stated that "pursuant to a written contract," the fee was "for all work through and including confirmation."

Second, as provided in Cohn's written contract, Cohn agreed to bill his clients at an hourly rate for all additional work performed after the confirmation of the plan. This proposed billing was not disclosed as required by section

329. According to the testimony and documentary evidence, once a client incurred post-confirmation charges, Cohn did not bill his client, did not itemize his services or hours worked, and did not provide notice directly to the client. Rather than applying for attorney's fees by using section 330, which would have required submitting itemized billing, Cohn filed a proof of claim pursuant to section 1305 as a general creditor with the bankruptcy court for a specific sum, but did not identify the sum as attorney's fees.

Section 1305 provides that "a proof of claim may be filed by any entity that holds a claim against the debtor," provided the claim is for "a consumer debt, that arises after the date of the order for relief under this chapter, and that is for property or services necessary for the debtor's performance under the plan." 11 U.S.C. § 1305(a). However, such a claim "shall be disallowed if the holder of such claim knew or should have known that prior approval by the trustee of the debtor's incurring the obligation was practicable and was not obtained." 11 U.S.C. § 1305(c). Examples of the "proof[s] of claim" authorized by this section and entered in the record reflect that it is a simple creditor's form requiring little detail and no supporting documentation. The trustee testified before the hearing panel that Cohn never obtained "prior approval" before filing these proofs of claim as a creditor under section 1305.

The trustee testified before the hearing panel that due to the high volume of cases and claims in the bankruptcy

court,[4] proofs of claim under section 1305 were administratively approved by the trustee's office as a matter of course. Once the proof of claim was approved, a notice of the claim, stamped with the trustee's and the judge's signature, was sent to the client. Clients had ten days to object to the claim, after which no action could be taken by the client. If there was no objection, the fees were added to the estate as an unsecured claim, meaning they would be paid at whatever percentage of their face value had been approved by the court for the plan.

Challenges to Cohn's Billing Method

In 1998, the Chapter 13 trustees brought an action in the bankruptcy court objecting to Cohn's section 1305 fee applications in sixty-one cases filed between 1991 and 1998. The cases were consolidated before Bankruptcy Judge William H. Brown, who ruled that Cohn's fee applications were improper. The court disallowed as "procedurally defective" all of the post-confirmation claims being challenged and vacated all previously-approved fee orders in the sixty-one cases. *In re Phillips,* 219 B.R. 1001, 1012 (Bankr. W.D. Tenn. 1998). The bankruptcy court ordered Cohn either to reapply for attorney's fees using section 330 of the bankruptcy code or to forfeit the fees. *Id.* The bankruptcy court later approved a settlement of the active cases only between Cohn and the trustees whereby the litigation was concluded upon Cohn repaying

[4] In 1998, there were 35,658 Chapter 13 cases pending in the Western District of Tennessee. *In re Phillips,* 219 B.R. 1001, 1011 (Bankr. W.D. Tenn. 1998). Each case generates multiple claims; Trustee George Stevenson testified that the trustee's office processes approximately 560 claims per day.

$2,436.85 to the trustees for post-confirmation fees improperly granted.

On October 28, 1998, after receiving a copy of *In re Phillips,* the Board of Professional Responsibility filed a Petition for Discipline alleging that Cohn's practice of filing the post-confirmation claims under section 1305 was unethical and in violation of several disciplinary rules. After considering the testimony and evidence outlined above, the BPR hearing panel released its written findings and ruled that Cohn had violated all of the disciplinary rules alleged in the petition, to wit:

> DR 1-102(A)(1) (violating a disciplinary rule);
>
> DR 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation);
>
> DR 1-102(A)(5) (engaging in conduct prejudicial to the administration of justice);
>
> DR 1-102(A)(6) (engaging in conduct that adversely reflects on a lawyer's fitness to practice law);
>
> DR 2-106(A) (contracting for, charging, or collecting an illegal or clearly excessive fee);
>
> DR 7-101(A)(3) (failing to explain matters to the client such that the client may make an informed decision);
>
> DR 7-101(A)(4)(c) (intentionally prejudicing or damaging the client during the course of the professional relationship);
>
> DR 7-102(A)(3) (concealing or failing to disclose that which the lawyer is legally required to reveal);

> DR 7-102(A)(8) (knowingly engaging in illegal conduct or conduct contrary to a Disciplinary Rule);
>
> DR 7-106(C)(5) (failing to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving opposing counsel timely notice of an intent not to comply).

Based on its findings, and on the fact that Cohn had received four prior reprimands,[5] the hearing panel imposed three sanctions. First, the panel required Cohn to disgorge within sixty days all funds received from the sixty-one clients identified in the bankruptcy court opinion. Second, the panel ruled that should disgorgement not occur within sixty days, Cohn's license should be suspended "until such time as Cohn presents proof of payment to the satisfaction of the appropriate reinstatement committee." Finally, the panel ruled that Cohn should receive a public censure. The panel assigned costs to Cohn.

Both Cohn and the Board sought judicial review of the hearing panel's decision by filing petitions for certiorari in the Chancery Court for Shelby County. The trial court agreed with the hearing panel that Cohn had violated the disciplinary rules enumerated in the panel's judgment and affirmed the order of a public censure. The court required

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[5] In 1987, Cohn received a private admonition for omitting the required disclaimer language from a print advertisement. In the same year, he received a separate private reprimand for three separate complaints against him (relating to failure to communicate with clients and to a dispute over fees). In 1995, Cohn received a private reprimand for "making negative comments concerning a judge." In 1997, Cohn received a private reprimand for improper advertising in the Yellow Pages.

Cohn to disgorge $13,996.73 in post-confirmation fees to the bankruptcy court, calculated as the difference between the full amount of post-confirmation fees collected from the sixty-one clients ($16,433.58, according to the bankruptcy trustee's audit presented at the BPR hearing) and the amount Cohn had already paid to the bankruptcy court as part of the settlement of the active cases ($2,436.85). The trial court also held that the hearing panel had erred in imposing a suspension of Cohn's law license should he fail to make the required disgorgement. In reversing the suspension, the chancellor found that Cohn "should have known what the law was," but that "Mr. Cohn did not attempt to hide or in any way act surreptitiously" with regard to collecting the fees, that the trustees "took absolutely no action to let Mr. Cohn know that this procedure was not the approved procedure," and that Cohn "does make a plausible argument" that section 1305 is an alternative method for seeking fees.

Both the Board and Cohn appealed the decision of the trial court to this Court.

STANDARD OF REVIEW

In ruling upon an appeal from a Board of Professional Responsibility hearing panel, the trial court "shall review the evidence before the hearing committee, as well as the proof either party may introduce, and shall determine the facts by the preponderance of the evidence." *Patty v. Board of Prof'l Responsibility,* 90 S.W.3d 641, 644 (Tenn. 2002); Tenn. Sup. Ct. R. 9, § 1.3. Where the trial judge bases his or her decision on the same evidence that is before the

hearing panel,[6] the trial judge must affirm the panel "'[u]nless that evidence preponderates against the findings by the Committee.'" *Gannon v. Board of Prof'l Responsibility,* 671 S.W.2d 835, 837 (Tenn.1984) (quoting *Office of Disciplinary Counsel v. McKinney,* 668 S.W.2d 293 (Tenn. 1984)).

Our review on appeal is limited to "the transcript of the record from the circuit or chancery court, which shall include the transcript of evidence before the hearing committee." Tenn. Sup. Ct. R. 9, § 1.3. We review the lower court's decision de novo, "with a presumption of correctness unless the preponderance of the evidence is contrary to the trial court's action." *Patty,* 90 S.W.3d at 644 (citing *Murphy v. Board of Prof'l Responsibility,* 924 S.W.2d 643 (Tenn. 1996)); *see also Galbreath v. Board of Prof'l Responsibility,* 121 S.W.3d 660, 665 (Tenn. 2003).

The conduct at issue occurred between 1991 and 1998. Therefore, we apply the Code of Professional Responsibility, rather than the Rules of Professional Conduct currently in force. Tenn. Sup. Ct. R. 8, Transition Rules Governing the Implementation of the Tennessee Rules of Professional Conduct (rules "shall become effective as of March 1, 2003, and shall have prospective application only . . .").

ANALYSIS

Cohn argues that disciplinary sanctions are not supported by the record because he applied for post-confirmation

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[6] The trial judge considered all of the evidence that was before the hearing panel, plus the deposition of an additional expert witness.

attorney's fees as a creditor using section 1305 in good faith. Cohn also raises several constitutional and procedural issues. The Board, however, argues that the sanctions imposed by the trial court were disproportionately mild and asks this Court to increase the severity of the disciplinary sanctions. We will address each argument in turn.

Violation of Disciplinary Rules

We must decide whether Cohn's use of section 1305 to obtain attorney's fees, prior to the bankruptcy court's decision in *In re Phillips,* violated his ethical obligations under the Code of Professional Responsibility. In this appeal, we accept and agree with the federal bankruptcy court's determination in *In re Phillips* that section 1305 is an improper vehicle for collecting attorney's fees. The issues before us are whether Cohn's conduct violated professional disciplinary rules and, if so, whether the trial court imposed appropriate sanctions.

Cohn asserts that in using section 1305 to collect post-confirmation attorney's fees as a creditor, he was making a good faith extension of the law for several reasons. First, Cohn argues that, by its plain terms, section 1305 should apply to attorney's fees. Second, he argues that prior to the bankruptcy court's decision in *In re Phillips,* there was no controlling authority on collecting post-confirmation fees in Chapter 13 cases. Third, he argues that because the trustee was aware of his practice for seven years before raising an objection, and because the bankruptcy court had adopted streamlined procedures for dealing with attorney's fees, he was entitled to believe that his practice was acceptable. Finally, Cohn argues that he has breached

no ethical duties because his conduct was "open and not concealed." The Board argues that the trial court's conclusion that Cohn violated the disciplinary rules charges is supported by the record.

Plain Language of Section 1305

Cohn argues that because section 1305 resides in Chapter 13, it was intended to apply broadly to Chapter 13 creditors. Section 1305 requires only a "proof of claim," rather than a detailed statement. Thus, Cohn argues, by its plain terms section 1305 obviates the necessity for a detailed statement as required by section 330 and Bankruptcy Rule 2016, even if the claim being submitted is for attorney's fees.[7]

We reject Cohn's argument that the plain terms of section 1305 permitted him to file proofs of claim for post-confirmation attorney's fees, because Cohn has not demonstrated that he either complied with or was excused from section 1305(c)'s requirement of prior trustee approval. In holding that section 1305 is not an appropriate vehicle for collecting post-confirmation attorney's fees, the bankruptcy court determined that prior approval of the trustee should be excused only when the claimant was ignorant of the requirement or when exigent circumstances (such as the need for immediate medical care or transportation) made it impossible to obtain approval. The court concluded that, as a long-time practitioner, it was "inconceivable that

[7] Rule 2016 provides that any "entity" seeking any "compensation for services" from the bankruptcy estate "shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested." Fed. R. Bankr. P. 2016(a).

Mr. Cohn [could] claim he [was] ignorant of the mandatory requirements of § 1305(c)." *In re Phillips,* 219 B.R. at 1007. As to the "exigent circumstances" requirement, the court examined the legislative history of section 1305 and concluded that section 1305 was not intended to encompass the type of "routine legal work" for which Cohn submitted claims. *Id.*

We are convinced by the bankruptcy court's analysis. The chancery court observed that Cohn made a "plausible" argument that section 1305 permitted him to seek post-confirmation fees using proofs of claim. We strongly disagree, based on both the legislative history of section 1305 and that section's requirement of trustee approval. First, section 1305 applies only to taxes and to claims for "consumer debt" that is "for property or services *necessary for the debtor's performance under the plan.*" 11 U.S.C. § 1305(a)(2) (emphasis added). "Consumer debt" is defined by the Bankruptcy Code as "debt incurred by an individual primarily for a personal, family or household purpose. . . ." 11 U.S.C. § 101(8) (2004). As the bankruptcy court explained, the legislative history reveals that in contemplating what might be "necessary for the debtor's performance," Congress was concerned with exigent circumstances. Examples of "necessary" services cited in the legislative history are medical bills or auto repairs to enable a debtor to get to work. *See In re Phillips,* 219 B.R. at 1007 (citing H.R. Rep. No. 95-595, at 427-28 (1977) (reprinted in (1978) U.S. Code Cong. & Admin. News 5787, 5963, 6383)). In sum, section 1305 creates a procedure to expedite the payment of necessary, unforeseen expenses incurred by a debtor. We agree with the bankruptcy court that "there is no indication that Congress intended routine legal work . . . to be

within the purview of § 1305." *In re Phillips,* 219 B.R. at 1007.

Second, Trustee George Stevenson argued to the bankruptcy court and testified before the hearing panel that even if the "consumer debt" contemplated by section 1305 included post-confirmation attorney's fees, Cohn did not comply with that section's requirement that the claimant receive prior approval of the trustee if "practicable." 11 U.S.C. § 1305(c). The statute plainly states that trustee approval must be obtained prior to incurring any charges "if practicable." As the bankruptcy court found, Cohn "made no showing whatsoever" that obtaining such approval was not practicable or that he ever attempted to obtain it. *In re Phillips,* 219 B.R. at 1007.

Absence of Controlling Authority

Cohn next argues that because the Bankruptcy Code contains no explicit provision governing post-confirmation fees in Chapter 13 cases, his use of section 1305 to collect post-confirmation fees was a good-faith attempt to extend the law.

As the trial court observed, prior to the bankruptcy court's opinion in *In re Phillips,* there was no definitive rule in the United States Code or in the case law governing post-confirmation fees in Chapter 13 cases. Indeed, "[t]he status of a post-petition claim under Chapter 13 [was] somewhat ambiguous." *In re Perkins,* 304 B.R. 477, 481 (Bankr. N.D. Ala. 2004); *cf. In re Bottone,* 226 B.R. 290, 296-97 (Bankr. D. Mass. 1998) (discussing whether attorney's fees incurred in Chapter 7 proceeding are payable upon conversion to Chapter 13); *In re Hanson,* 223 B.R. 775, 780 (Bankr. D. Or. 1998) (following *In re Phillips*

and holding that section 1305 may not be used for post-confirmation attorney's fees). While we agree that the Bankruptcy Code is not a model of clarity on the subject of post-confirmation Chapter 13 attorney's fees, we note that the provisions of the code that do address attorney's fees evince an overarching concern for disclosure. In concluding that section 1305 was an improper vehicle for collecting post-confirmation attorney's fees, the bankruptcy court emphasized the fact that Cohn's procedure evaded meaningful review by the bankruptcy court, the creditors, and his clients. *In re Phillips,* 219 B.R. at 1008. The court explained that because there is always a potential conflict of interest between the attorney and the debtor when a debtor's attorney seeks additional fees, the code's requirements of full disclosure, notice and a hearing are critical to "protect the debtor by assuring review of the attorney's application by both the chapter 13 trustee and the bankruptcy judge, as well as by the debtor." *Id.* at 1010.

Additionally, the testimony before the hearing panel as to local practice and procedures weighs heavily against a finding of good faith as to controlling authority. Judge Brown, Trustee Stevenson, and two expert witnesses testified that when the court granted bankruptcy practitioners the initial fee (based on the presumption of reasonableness), all understood that the fee was intended to cover the entire representation, not just pre-confirmation proceedings.[8] This understanding that the initial fee was

[8] For example, Judge Brown stated in his deposition, "[i]f I thought that that presumptive fee was just to get the confirmation, I wouldn't be allowing it personally, because it's too much money to just get to confirmation. In the typical case, I consider you've bought into the whole case."

to cover the entire case is bolstered by testimony that filing for additional fees was extremely rare.

Although we recognize that the Bankruptcy Code is not crystal clear with regard to post-confirmation attorney's fees, we agree with the bankruptcy court and with the hearing panel that "inherent in all of the workings of the bankruptcy court is a controlling principle that a full review of all attorney's fees must occur." *See also In re Kisseberth,* 273 F.3d 714, 721 (6th Cir. 2001) ("The provisions of the Bankruptcy Code and the Bankruptcy Rules that regulate attorney fees are designed to protect both creditors and the debtor against overreaching attorneys."); 11 U.S.C. § 329 (requiring fee disclosure) and § 330(a)(4)(B) (permitting courts to approve "reasonable" attorney's fees only upon a determination of "benefit and necessity" to the debtor). Cohn's procedure subverted this controlling principle and cannot be said to have been in good faith.

Trustee's Tacit Validation of Cohn's Practice

Cohn next argues that because the Chapter 13 trustee was aware of his practice as early as 1991, but did not object to it until 1998, he was entitled to believe that his practice had the trustee's approval. Additionally, he argues that because the Western District had adopted a system for awarding attorney's fees based on efficiency and presumptions of reasonableness, rather than engaging in the strict lodestar analysis required by the Sixth Circuit, he was acting in good faith by working within the framework established by the local bankruptcy court.

The record firmly establishes that the trustee did know about Cohn's procedure for seven years prior to bringing the objections that resulted in *In re Phillips.* The

trustee attributed the delay in addressing Cohn's procedure to the fact that, "we are so big, we involve so many processes that processes just go on . . . you can't look at each and every process each and every day. Things . . . don't get reviewed until some event triggers a review. . . ."

Cohn argues that the Western District's method for awarding fees based on a presumption of reasonableness was not in strict compliance with the Sixth Circuit's pronouncement that bankruptcy courts must conduct a lodestar analysis in awarding attorney's fees. *See Boddy,* 950 F.2d at 337 ("the establishment of a fixed fee for certain 'normal and customary' services is directly contrary to the plain 'actual, necessary services rendered' language of 11 U.S.C. § 330"). Judge Brown and the trustee both testified that the Western District's method is distinguishable from *Boddy,* as the Western District uses only a presumption of reasonableness, rather than a fixed fee. In any event, our task is not to assess the correctness of the bankruptcy court's procedures; Cohn's argument amounts to an assertion that because the bankruptcy court may not have been in strict compliance with the Bankruptcy Code, he was not required to comply either. We reject this argument.

Although the bankruptcy court acknowledged that both the trustees and the court itself shared some responsibility for allowing Cohn's use of section 1305 to persist for so long, the bankruptcy court ultimately laid the blame squarely upon Cohn, as did the hearing panel. The trial court agreed that Cohn violated the disciplinary rules, but found that the trustee's delay in addressing Cohn's procedure militated against the imposition of sanctions. Evidence of the trustee's inaction did not, however, convince the hearing panel or the chancellor that Cohn did not

violate the Disciplinary Rules charged in the petition. Judge Brown and the expert witnesses testified before the hearing panel that, rather than making assumptions, if a practitioner was unsure of whether his attorney's fee filings were correct, the proper thing to do would be to ask the trustee. Although we also believe the trustee and the bankruptcy court share some responsibility for allowing Cohn's practice to continue for seven years, we decline to adopt Cohn's argument that, essentially, the trustee and the court are to blame for not catching him sooner. We believe the primary responsibility is Cohn's for initiating and continuing the practice until he was stopped, and we agree that the preponderance of the evidence supports the conclusion that Cohn did violate the disciplinary rules as charged.

Conduct "Open and not Concealed"

Cohn does not deny that, in practice, his post-confirmation fees were not subject to scrutiny by the court, the trustee, or the client. He argues, however, and the chancery court found, that in spite of the vague nature of the proofs of claim he did not "attempt to hide" what he was doing and did not "act surreptitiously" in filing his proofs of claim. Cohn argues that all parties had an opportunity to review and object to his claims and faults the bankruptcy court and the trustees for not availing themselves of the opportunity to scrutinize his claims.[9]

[9] Essentially, Cohn argued that the court should be looking at all orders approving proofs of claim, since they carry a signature stamp of both the judge and the trustee. Judge Brown replied that that would be impractical, but told Cohn, "If you would file a 330 application, I would look at it. . . . I look at every 330 application . . . but when it is an

(Continued on following page)

Although technically Cohn's procedure appeared to be open, in practice it was concealed. As the hearing panel stated, "the procedure used by Cohn was designed to avoid the scrutiny of the bankruptcy court, the Bankruptcy Trustee and the client." The record establishes that Cohn knew that due to the volume of claims submitted to the court, his proofs of claim would not be meaningfully reviewed by either the trustee or the court. Indeed, the Bankruptcy Code provides that proofs of claim are generally to be "deemed allowed." 11 U.S.C. § 502 (2004). One expert witness, as well as the Chapter 13 trustee, testified that the proof of claim forms filed by Cohn did not in any way indicate that they were for post-confirmation fees. (As the trustee testified, "[t]hese particular claims, there's no telling what they're for. Cohn could've been their landlord.") Moreover, the only notice of the claims Cohn's clients received was an order stating that the claims had already been approved, without any explanatory or supporting documentation. We are particularly disturbed by the lack of meaningful notice given to Cohn's clients of both his post-confirmation claims procedure and the post-confirmation claims themselves. We note that the record establishes that all clients signed the contract and that Cohn testified that he explained the contract and the terms of his representation to all of his clients. However, although the record contains testimony from a few clients who seemed to understand Cohn's two-part fee structure, there is also ample testimony from a number of clients

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administrative order that's not put on the calendar for a hearing or any opportunity for a hearing, then it never comes to my attention. . . . And that is what I am trying to point out to you, is that the present procedure you are using never gets on the calendar, it never is brought to a judge's attention."

who did not understand the system. We conclude that in light of his failure to give meaningful notice of his post-confirmation claims to the court, the trustee, and his clients, Cohn's practice was not open but was surreptitious and designed to avoid scrutiny.

Conclusion

In sum, we affirm the trial court's affirmance of the hearing panel's determination that Cohn violated the disciplinary rules charged. The preponderance of the evidence supports the conclusions of the hearing panel and the chancery court. The record contains ample evidence that, as an experienced bankruptcy practitioner, Cohn used section 1305 to collect post-confirmation attorney's fees and thus avoided the disclosure requirements of section 330. He thereby breached his ethical duties to his clients, to the court, and to the profession. We affirm the chancery court's conclusion that Cohn violated the disciplinary rules.

Cohn's Other Arguments

Cohn makes several other arguments against the imposition of discipline, including questioning this Court's jurisdiction and raising constitutional claims. We address those issues briefly.

First, Cohn argues that under the doctrine of res judicata, this Court has no authority to order disgorgement in closed bankruptcy cases because those cases are final federal court orders. The doctrine of res judicata "bars a second suit between the same parties or their privies on the same cause of action with respect to all issues which were or could have been litigated in the

former suit." *Richardson v. Tennessee Bd. of Dentistry,* 913 S.W.2d 446, 459 (Tenn. 1995) (quoting *Goeke v. Woods,* 777 S.W.2d 347, 349 (Tenn. 1989)). The doctrine does not apply here. Neither claim preclusion nor issue preclusion bar the Board's action against Cohn because the Board was not a party to the bankruptcy court proceedings, and the bankruptcy court cannot be said to have been in privity with the Board. *See, e.g., Harris v. St. Mary's Med. Ctr.,* 726 S.W.2d 902, 905 (Tenn. 1987).

In addition, although the bankruptcy court's approval of a settlement as to the attorney's fee dispute in *In re Phillips* is a final judgment, it does not preclude the Board of Professional Responsibility, under the authority of this Court, from ordering disgorgement in those cases. We have stated many times that this Court has inherent authority to regulate the practice of law pursuant to Article VI, section 1 of the Tennessee Constitution. *Doe v. Board of Prof'l Responsibility,* 104 S.W.3d 465, 469 (Tenn. 2003); *see also Brown v. Board of Prof'l Responsibility,* 29 S.W.3d 445, 449 (Tenn. 2000); *Petition of Burson,* 909 S.W.2d 768, 772-73 (Tenn. 1995); *Petition of Tennessee Bar Ass'n,* 532 S.W.2d 224, 228-29 (Tenn. 1975); *Belmont v. Board of Law Exam'rs,* 511 S.W.2d 461, 462 (Tenn. 1974). "In furtherance of our duty to regulate the practice of law in Tennessee . . . when appropriate, [we] discipline attorneys who violate the rules governing the legal profession." *Doe,* 104 S.W.3d at 470. In short, orders of disgorgement in a bankruptcy case are sanctions upon an attorney, not a modification of a debtor's discharge.

Next, Cohn argues that the Board cannot appeal a decision of a hearing panel. We also find this argument to be without merit. Tennessee Supreme Court Rule 9, section 6.1 provides that this Court "shall appoint one

hearing committee within each disciplinary district." The rule further provides that disciplinary charges shall be decided by a hearing panel, which is a three-member subset of the hearing committee. *Id.* § 6.4. The rules also provide that "[t]he respondent or the Board may have a review of the judgment of a hearing committee. . . ." *Id.* § 1.3. The Board is not appealing its "own" decision, as Cohn argues, but is appealing the decision of a separate entity, the hearing committee. *See also* Tenn.Code Ann. § 27-9-101 (2000) (providing that "[a]nyone who may be aggrieved" may appeal a judgment).

Third, Cohn argues that the hearing panel's failure to bifurcate the issue of his punishment and the issue of whether he had committed ethical violations infringed his right to due process. Cohn argues that because his four previous reprimands were private, rather than public, sanctions, neither the fact of the reprimands nor their substance should be disclosed to the hearing panel. Cohn has cited to us no authority requiring that hearing committee proceedings be bifurcated, and we have found none. Although private reprimands are indeed intended to be a matter between the attorney and the Board, "former misconduct must remain a part of the professional record to be considered as part of the evidence of professional fitness or unfitness." *Berke v. Chattanooga Bar Ass'n,* 436 S.W.2d 296, 309 (Tenn.Ct.App. 1968). Accordingly, we find no error in this regard either before the hearing panel or the trial court.

Finally, Cohn raises several additional vague due process arguments, citing no authority and offering little argument to support his contentions. We therefore conclude that there is no merit to his contentions and that he is not entitled to relief on those grounds.

Sanctions

Cohn also appeals the chancery court's order that he disgorge all post-confirmation attorney's fees in the sixty-one cases before the bankruptcy court in *In re Phillips.* The Board appeals the trial court's failure to suspend Cohn's law license, arguing that a minimum two-year suspension is appropriate, given the nature of the violation and Cohn's prior disciplinary record.

Disgorgement

The bankruptcy court approved a settlement order in the active cases requiring Cohn to disgorge $2,436.85 in post-confirmation attorney's fees. The hearing panel ordered Cohn to disgorge "all funds" received from the sixty-one clients at issue in *In re Phillips,* and the chancery court affirmed the order to the extent that the fees were for post-confirmation work, ordering Cohn to return $13,996.73 to the bankruptcy court.[10] The Board urges us to affirm the disgorgement order, arguing that attorneys who are in the wrong are not entitled to *quantum meruit* compensation. *See Swafford v. Harris,* 967 S.W.2d 319, 324-25 (Tenn. 1998); *White v. McBride,* 937 S.W.2d 796, 803 (Tenn. 1996).

Having reviewed the record, we affirm the decision of the chancery court and conclude that its decision to require disgorgement of the full amount of the fees was supported by a preponderance of the evidence. As an

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[10] Cohn has not argued against the calculation of this amount, only that the disgorgement order as a whole was not warranted. Cohn stated at oral argument that he has satisfied the order to reimburse the bankruptcy court.

experienced bankruptcy attorney, Cohn was certainly aware that his surreptitious method for obtaining post-confirmation fees had not been approved by the bankruptcy court and that as a result his fee applications were not being meaningfully reviewed by the court. Additionally, the record establishes that it was common knowledge among bankruptcy practitioners in the Western District that the initial fee was intended to cover an attorney's entire representation in a bankruptcy case. Although Cohn stated in both his contracts and his section 329 disclosures that he would only apply the initial fee to pre-confirmation work, as we conclude above, the Bankruptcy Code requires that attorney's fees receive meaningful approval from both the client and the court. Finally, Cohn represented to his clients that he would bill them by the hour for post-confirmation fees, but the record establishes that he did not bill them and did not actually keep time records upon which to base those post-confirmation fees.[11]

Moreover, Cohn stated several times in the record that, because the post-confirmation fees were to be paid as unsecured claims, he did not expect to collect the full amount of the fees. Judge Brown testified that Cohn's post-confirmation charges were excessive, and in *In re Phillips,* he was critical of the fact that Cohn charged $450 "over and over for what appeared to be simple and very routine matters." 219 B.R. at 1008. Judge Brown testified that these "routine motions" were "more of an administrative matter than a legal matter, justifying very little time

[11] Cohn admitted before the bankruptcy court, and again before this court during oral argument, that he does not keep time records in spite of his contractual promise to his clients that he would bill by the hour.

on the part of the attorney." Although Cohn attempted to defend the amount of the post-confirmation claims as reasonable, his expectation that such claims would be paid at only a percentage of their face value raises a troubling inference of inflated billing in violation of the Bankruptcy Code and in violation of the disciplinary rules. This violation, standing alone, justifies disgorgement of the fees.[12]

The chancery court ordered disgorgement of the fees to the bankruptcy court. The chancellor stated that "perhaps the bankruptcy court may determine that [Cohn is] entitled to some or may determine that he's entitled to none of them, but that's not my decision." We agree that the prudent course is to leave it to the bankruptcy court to decide whether to allow Cohn to reapply for any of the fees using section 330, as it did in its earlier proceeding.

Suspension

The hearing panel ordered Cohn to make disgorgement within sixty days; should he fail to do so, the panel imposed an "automatic suspension" of Cohn's license "until such time" as Cohn proved that the required payment had been made. Cohn made the payment and so was not subject to the suspension. The chancery court declined to approve the Board's suspension order until the fees were

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[12] As the bankruptcy court explained,

> Mr. Cohn states that he was not attempting to collect 100% of these post-confirmation fees since most of his clients' plans were confirmed at less than 100% to unsecured creditors. . . . The flaw in this theory is its apparent admission that the claimed fee is in excess of what is reasonably expected; thus, the process invites even more ethical issues.

219 B.R. at 1011.

paid, reasoning that it amounted to an improper indefinite suspension.[13] The Board argues strenuously that a suspension of at least two years is appropriate.

In urging us to impose a lengthy suspension on Cohn, the Board directs us to the standards set forth by the American Bar Association ("ABA"). *See* ABA's Standards for Imposing Lawyer Sanctions (1986, as amended 1992) ("ABA Standards"). The Board has adopted the ABA Standards for disciplinary matters. *Dockery v. Board of Prof'l Responsibility,* 937 S.W.2d 863, 866 n.6 (Tenn. 1996).

Although not binding on this Court, we note that the ABA Standards instruct a court to examine the duty violated, the attorney's mental state, the potential or actual injury caused by the attorney's misconduct, and the existence of any aggravating or mitigating factors. ABA Standard 3.0. The standards generally provide that suspension is appropriate when a lawyer knowingly breaches a duty or otherwise engages in misconduct. *See* ABA Standards 4-7. The standards recommend that suspensions be for a minimum of six months. ABA Standard 2.3.

We agree with the Board that the preponderance of the evidence supports imposing a suspension on Cohn. Cohn used an improper, deceitful procedure to collect attorney's fees that he knew, or certainly should have

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[13] *See* Supreme Court Rule 9 § 4.2 (providing that discipline may include "[s]uspension for an appropriate fixed period of time, or for an appropriate fixed period of time and an indefinite period concurrently or thereafter to be determined by the conditions imposed by the judgment").

known, was not supported by the plain language of the code or by local practice and procedure. He violated the duty to refrain from conduct that involves fraud, deceit, or misrepresentation; he violated the duty to explain matters clearly to his clients; he violated the duty not to charge clearly excessive fees; and he knowingly engaged in conduct prejudicial to the administration of justice. By filing for attorney's fees using a method that avoided, almost entirely, the scrutiny of the court, Cohn eviscerated the judicial oversight functions essential to maintaining the integrity of the relationship between a Chapter 13 debtor and his attorney. As the bankruptcy court noted, Cohn created a situation ripe for the possibility of a conflict of interest between himself and his clients. Although there is always a potential conflict between a debtor and her attorney when the attorney seeks fees from the debtor's estate, Cohn's clandestine use of section 1305 evaded the judicial oversight necessary to protect his debtor clients. Moreover, he engaged in this conduct for over seven years.

In determining the length of a suspension, we must consider the aggravating and mitigating factors. Aggravating factors, as pointed out by the Board, include Cohn's four prior reprimands. Additional aggravating factors are the fact that Cohn is an experienced bankruptcy attorney and the fact that he engaged in a pattern of misconduct in multiple cases over the course of seven years.

As to mitigating factors, we agree with the chancellor's conclusion that the bankruptcy trustee must share some responsibility for not stopping the practice earlier, but the primary responsibility remains Cohn's. He created a surreptitious, deceitful method of collecting attorney's fees calculated to avoid the scrutiny of his own clients, the

trustee, and the court. He continued the practice for seven years until he was finally stopped. Weighing the aggravating factors against the mitigating factors, we have determined a suspension is justified, but we decline to order the ABA recommended suspension of six months. Instead, we impose a suspension of ninety days.

CONCLUSION

After our review of the record, we conclude that the chancery court properly affirmed the hearing committee's conclusions with regard to the petitioner's violations of the disciplinary rules, and we affirm that part of the chancery court's judgment. We also affirm the chancery court's order of disgorgement, but we vacate its imposition of a public censure. We reverse the chancery court's decision not to impose a suspension, and hereby order that Cohn be suspended for a period of ninety days. The costs of the appeal are assessed equally between the parties.

E. RILEY ANDERSON,
JUSTICE

**IN DISCIPLINARY DISTRICT IX
OF THE BOARD OF PROFESSIONAL
RESPONSIBILITY OF THE
SUPREME COURT OF TENNESSEE**

DOCKET NO. 98-1084-9-JJ

IN RE: WILLIAM A. COHN, #5873
RESPONDENT, AN ATTORNEY
LICENSED TO PRACTICE LAW
IN TENNESSEE

FINDINGS OF THE PANEL

(Filed April 24, 2002)

This cause came on to be heard on February 25 and 26, 2002, upon the complaint of the Board of Professional Responsibility, hereinafter referred to as "the Board," for disciplinary action against the Respondent, William A. Cohn, hereinafter referred to as "Mr. Cohn."

Present at the hearing were the following, C. Suzanne Landers, panel chair, JoeDae Jenkins, panel member, Barbaralette Davis, panel member, Mr. Jesse Joseph, Disciplinary Counsel, Mr. David Siegel, counsel for Mr. Cohn, and Mr. Cohn, the Respondent.

Upon petition filed, responsive pleadings filed in response thereto, upon testimony of Mr. Cohn, Judge William Houston Brown via evidentiary deposition, upon testimony of miscellaneous fact witnesses identified more specifically below, upon testimony of experts for both Mr. Cohn and the Board, and upon the record as a whole, the Panel finds as follows.

Preliminary Matters

1. A motion in limine was made by Mr. Siegel to strike certain portions of the evidentiary deposition given by Judge William Houston Brown.

A. Mr. Siegel's motion to strike Judge Brown's testimony at page 28, lines 14 through 16 was denied.

B. Mr. Siegel's motion to strike Judge Brown's testimony at page 48, lines 23 through 24 and page 49, lines 1 through 11 was denied.

C. Mr. Siegel's motion to strike Judge Brown's testimony at page 52, lines 1 though 6, page 55, lines 15 through 24, and page 56, lines 1 through 20: excessiveness of fees in closed cases, which Brown reviewed was denied.

D. Mr. Siegel's motion to strike Judge Brown's testimony at page 82, lines 1 through 13 is granted based upon the hearsay contained therein.

2. Witnesses Mary Helen Williams, Albert Williams and Ruck Yuwell did not appear in spite of being subpoenaed to testify by Mr. Joseph. Thus, on behalf of the board of Professional Responsibility, Mr. Joseph waived his right to present these witnesses, as well as his right to a continuance, and the Board will take no further action with regard to File No. 17574-9-JJ (complaint of Ms. Mary Williams), which is hereby dismissed.

Findings of the Panel

1. There is no dispute that Mr. Cohn is a well-known, experienced bankruptcy practitioner who has

practiced before the courts in Shelby County, Tennessee, for a period that exceeds twenty (20) years.

2. There is also no dispute that Mr. Cohn. has extensive knowledge of the law in the area of bankruptcy, and specifically Chapters 13 and Chapters 11. In fact, Mr. Cohn acknowledges that he knew the law "backwards and forwards."

3. There is no dispute that Mr. Cohn at one time was board certified as Creditor's Rights and Consumer Bankruptcy; however, he allowed those certifications to lapse approximately three (3) years ago.

4. Between the years of 1991 and 1998, Mr. Cohn represented the sixty-one (61) plaintiffs named in the transcript of a hearing before Judge William Houston Brown identified as Trial Exhibit 26, as well as the additional clients identified in Trial Exhibit 17, and Mr. Cohn does not dispute that in each of these cases the following occurred:

a. An employment agreement was signed by each client, similar to Trial Exhibit 1.

b. The employment agreement provided for payment of a flat fee that varied in amounts between clients; however, all of the agreements provided for Mr. Cohn to receive additional fees for any matters handled after the Bankruptcy Court's confirmation of the client's bankruptcy plan.

c. These additional fees were to be charged by the hour for actual services performed.

d. No records were kept by Mr. Cohn regarding these additional attorneys fees, and the fee statements related thereto have been reconstructed in their

entirety by Mr. Cohn and his staff without the benefit of actual records as to time spent or a time-keeping software program. Thus, no itemized statements were submitted by Mr. Cohn contemporaneously with the rendering of these additional services.

e. The method used by Mr. Cohn for obtaining payment of these additional attorneys fees was by virtue of a Section 1305 filing for payment of a "consumer debt" as opposed to a Section 330 filing, which deals specifically with a claim for attorneys fees, and none of the applications submitted by Mr. Cohn under Section 1305 contained an itemized statement for legal services rendered.

f. The procedure utilized in a Section 1305 filing involved Mr. Cohn drafting a single document that is both an order and a notice to the client that additional fees are being awarded. This order was then signed by the Bankruptcy Judge and the Trustee, after which the Trustee mailed an attested copy of the order/notice to the client. The client then had somewhere between fifteen (15) and thirty (30) days to file an objection to the ordered fees, after which no action could be taken by the client.

g. At no time from the filing of the Section 1305 order/notice did the Bankruptcy Judge have an opportunity to review and approve the additional fees requested by Mr. Cohn. In fact, it is not readily discernable from a review of the document that the claim is actually for attorneys fees.

h. Additionally, at the time that the employment agreements were being executed by Mr. Cohn's clients, these clients were also being inundated

with a copious amount of written material concerning general bankruptcy law and Chapter 13 bankruptcy procedure. Further, the clients in question, some of whom appeared before this panel, seemed unsophisticated and were being asked to sign numerous documents, many of which were blank or contained blanks to be completed later by Mr. Cohn or his staff.

i. At the same time that numerous documents, including the employment agreement, were being presented to his clients, Mr. Cohn was spending only a minimal amount of time talking to the clients, choosing instead to delegate most of the client contact to his non-licensed staff.

5. This method devised by Mr. Cohn took advantage of certain deficiencies known by Mr. Cohn to exist in the procedural system of the Bankruptcy Court as it relates to the filing of what is known as a "post-confirmation claim" for attorneys fees, which is a claim for attorneys fees incurred after the client's Chapter 13 had received confirmation by the Bankruptcy Court. These deficiencies, which existed by virtue of slight differences in Sections 1305 and Section 330 of the Bankruptcy Code, enabled Mr. Cohn to obtain fees from his clients "post-confirmation" without providing his clients or the Bankruptcy Court with contemporaneous, substantive knowledge that he was obtaining approval for post-confirmation fees, and without providing the Bankruptcy Court, the Bankruptcy Trustee or his clients the true ability to object to the unsubstantiated post-confirmation.

6. Further, it is clear from the testimony of Judge William H. Brown, Trustee George W. Stevenson, Attorney Ben Sissman, and Mr. Cohn's own expert, Attorney Russell Savory that inherent in all of the workings of the

Bankruptcy Court is a controlling principal that a full review of all attorneys fees must occur. Unfortunately, the process utilized by Mr. Cohn in obtaining post-confirmation attorneys fees did not provide the level of review that Mr. Cohn knew or should have known would be expected and/or required by the Bankruptcy Court. Hence, it is the opinion of this panel that the procedure used by Mr. Cohn was designed to avoid the scrutiny of the Bankruptcy Court, the Bankruptcy Trustee and the client, and the post-confirmation fees obtained through this process were inappropriately obtained.

7. On the subject of the appropriate disciplinary action to be taken, this panel is of the following opinion:

a. Mr. Cohn's actions caused serious injury to his clients, to the Bankruptcy Court, and to the legal system itself, causing a direct and negative impact on the public's perceptions of and confidence in an attorney's obligations and responsibilities to ensure honest, open and fair dealings with their clients.

b. Mr. Cohn's actions, while perhaps not necessarily constituting fraud, clearly constituted the surreptitious procurement of unapproved, unsubstantiated fees, and they deprived both the Bankruptcy Court and his clients of the ability to understand and object to said fees.

c. Mr. Cohn's conduct is violative of DR 1-102(A)(1)(4)(5) and (6); DR 2-106(A); DR 7-101(A)(3) and (4)(c); DR 7-102(A)(3) and (8); and DR 7-106(C)(5).

d. Mr. Cohn's tremendous level of experience and expertise lead the panel to conclude that Mr. Cohn knew or should have known that the procedure he

was using was, at a minimum, deceptive and inappropriate, if not fraudulent.

e. Taking into account the foregoing, along with Mr. Cohn's four (4) prior private disciplinary sanctions, the panel is of the opinion that the following should occur:

i. All funds received by Mr. Cohn from the sixty-one (61) clients identified in the Bankruptcy Court's open files should be completely disgorged within a sixty (60) day period, and Mr. Cohn should receive a public censure. However, should disgorgement not occur within said period of time, then an automatic suspension of Mr. Cohn's license to practice law should be instated until such time as Mr. Cohn presents proof of payment to the satisfaction of the appropriate reinstatement committee.

ii. Insufficient proof was presented as it relates to additional closed bankruptcy files handled by Mr. Cohn; thus, the panel is not rendering any opinion thereon.

iii. The costs of this cause should be assessed against Mr. Cohn.

So finds the panel this 8th day of April, 2002.

/s/ C. Suzanne Landers
C. Suzanne Landers, Panel Chair

/s/ JoeDae Jenkins w/permission
JoeDae Jenkins, Panelist 4-8-02

/s/ Barbaralette Davis w/permission
Barbaralette Davis, Panelist 4-8-02

ROSTER OF TRIAL EXHIBITS

1. **Exhibit 1**: Mr. Cohn's Standard Contract for Representation
2. **Exhibit 2**: Mr. Cohn's orange Informational booklet given to all clients
3. **Exhibit 3**: Mr. Cohn's first Informational booklet about bankruptcy
4. **Exhibit 4**: Mr. Cohn's second information booklet about Chapter 13
5. **Exhibit 5**: Mr. Cohn's contract with Minnie Phillips
6. **Exhibit 6**: Registration sheet and information booklet for Minnie Phillips
7. **Exhibit 7**: Registration sheet and information booklet for Willie Harltey
8. **Exhibit 8**: Registration sheet and information booklet for Sharon Muse
9. **Exhibit 9**: Sharon Muse's Bankruptcy petition
10. **Exhibit 10**: Sharon Muse's Administrative Order Allowing Claims
11. **Exhibit 11**: Registration sheet and information booklet for Steven and Rebecca Parker
12. **Exhibit 12**: Contract for representation with Steven and Rebecca Parker
13. **Exhibit 13**: Registration sheet and information booklet for Keith Perry
14. **Exhibit 14**: Employment Agreement with Keith Perry
15. **Exhibit 15**: Order Lowering Percentage to Unsecured Creditors and Reducing Payments in the matter of Keith Perry
16. **Exhibit 16**: Certificate of Service in the matter of Keith Perry
17. **Exhibit 17**: Roster of Cohn Law Firm Fees
18. **Exhibit 18 (Collective)**: June 15, 2001 letter to Judge Kennedy
19. **Exhibit 19**: June 20, 2001 letter from Judge Kennedy to Messrs. Cohn and Joseph

20. **Exhibit 20 (Collective)**: Proofs of claims filed between 1993 and 1998.
21. **Exhibit 21**: Motion for attorneys fees in Steven Grays matter.
22. **Exhibit 22**: Motion for award of fees in Willie Hartley's case. June 1, 1998.
23. **Exhibit 23**: Motion for Attorneys fees in Steven Parker's case filed by Cohn.

24. **Exhibit 24**: April 1, 1998 transcript.
25. **Exhibit 25**: April 7, 1998 transcript.
26. **Exhibit 26**: July 29, 1998 transcript.
27. **Exhibit 27**: February 17, 1987 private informal admonition. #4840-9
28. **Exhibit 28**: July 13, 1987, private reprimand. #4405-9; 4777-9-M; and 4978-9-M
29. **Exhibit 29**: April 12, 1997, private reprimand. #90-499-9-CH.
30. **Exhibit 30**: June 5, 1997, private reprimand. #15632-9-JJ, 17007-9-JJ.
31. **Exhibit 31**: Judge's Brown Memorandum opinion dated May 8, 1998.
32. **Exhibit 32**: August 13, 1998, Bankruptcy Order from Judge Brown.
33. **Exhibit 33**: Affidavit of Attorney Ben Sissman, October 16, 2000.
34. **Exhibit 34**: Affidavit of Trustee George Stevenson, November 1, 2000.
35. **Exhibit 35**: Objection filed by Trustee to Mr. Cohn's Post-Confirmation Claims for fees.

ROSTER OF TRIAL WITNESSES

Witness No. 1: Ms. Minnie D. Phillips, Burlison, TN.
Witness No. 2: Mr. Willie Hartley, 5010 Pennwood Cove, Memphis, TN.
Witness No. 3: Ms. Sharon Jenkins Muse, 1310 E. Holmes Road, Memphis, TN.

Witness No. 4: Mr. Steven Lynn Gray, 635 Emily Rd., Oakland, TN.
Witness No. 5: Mr. Steven C. Parker, 1602 Bell Tree Drive, Cordova, TN.
Witness No. 6: Keith Dewayne Perry, 5378 Beaverton Street, Memphis, TN, 38127.
Witness No. 7: Mary Helen Williams (did not appear in spite of subpoena).
Witness No. 8: Albert Williams (did not appear in spite of subpoena).
Witness No. 9: Rick Yuwell (did not appear in spite of subpoena).
Witness No. 10: Mr. Bill Cohn, respondent.
Witness No. 11: Attorney Ben Sissman.
Witness No. 12: Trustee George W. Stevenson.
Witness No. 13: Attorney Russell Savory.

IN THE CHANCERY COURT FOR SHELBY COUNTY THIRTIETH JUDICIAL DISTRICT OF TENNESSEE AT MEMPHIS

WILLIAM A. COHN, Petitioner and Cross-Respondent, vs. BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE, Respondent, and Cross-Petitioner.	)	No. CH-02-0199-1

JUDGMENT OF THE COURT

This matter came to be heard on October 30, 2002 upon the petition for writ of certiorari filed by William A. Cohn and upon the Cross Petition for writ of certiorari filed by the Board, from the April 24, 2002 Judgment of the Hearing Committee Panel. The Hearing Panel imposed a Public Censure against Mr. Cohn's law license in its Judgment, and an indefinite suspension of his license if he did not make certain disgorgement within a certain period of time. After taking this matter under advisement, the Court announced its decision by way of conference call with Mr. Cohn and with counsel for the parties on March 4, 2003. This case was reviewed upon the record compiled before the Hearing Panel, and upon the deposition testimony of Mr. Rothschild as additional proof filed with the Court.

Upon a review of the Hearing Committee Judgment, the parties' pleadings, briefs, arguments of counsel, additional proof submitted and the entire record herein, it

is hereby the finding of the Court that the Judgment of the Hearing Committee Panel is affirmed and modified in part. The Court finds that Mr. Cohn has violated the authorities as included within said Hearing Panel Judgment, but that the Hearing Panel erred in imposing an indefinite suspension of his law license.

The Court further finds that Mr. Cohn should not be suspended, but instead, should be publicly censured and required to make disgorgement of postconfirmation fees received in the amount of $13,996.73 to the Clerk of the US Bankruptcy Court for the Western District of Tennessean in Memphis, within, sixty (60) days after the entry of this Judgment. Except as noted above, and as noted in the transcript of the May 4, 2003 conference call, the Judgment of the Hearing Committee Panel is affirmed.

It is therefore **ORDERED**, that the law license of William A. Cohn be publicly censured, that he be required to disgorge the sum of $13,996.73 to the Clerk of the US Bankruptcy Court for the Western District of Tennessee at Memphis within 60 days after the entry of this Judgment, and that the costs of the Board and the litigation costs herein be taxed to Mr. Cohn. Attached to this Judgment and incorporated herein are copies of pages 3-21 of the transcript of the March 4, 2003 conference call which constitute the Court's ruling. **IT IS SO ORDERED**.

This the 14th day of March, 2003.

J. Steven Stafford
J. Steven Stafford
Chancellor by Designation
29th Judicial District

APPROVED FOR ENTRY:

/s/ Jesse D. Joseph
Jesse D. Joseph, BOPR # 10509
Disciplinary Counsel
1101 Kermit Dr., Suite 730
Nashville, TN 37217
615/361-7500

CERTIFICATE OF SERVICE

I hereby certify I have mailed a copy of the foregoing proposed Judgment of the Court to both counsel for the petitioner, David A. Siegel, Esq., Nahon & Saharovich, 5100 Poplar Ave., Suite 2500, Memphis, TN 38137, and to petitioner William A. Cohn, Esq. 291 Germantown Bend Cove, Cordova, TN 38018, on this the 12th day of March, 2003.

Jesse D. Joseph
Jesse D. Joseph

IN THE CHANCERY COURT FOR SHELBY COUNTY
FOR THE THIRTIETH JUDICIAL
DISTRICT AT MEMPHIS

WILLIAM A. COHN	)	
Petitioner and Cross-Respondent,	)	
v.	)	CH-02-0199-1
BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE,	)	
Respondent and Cross-Petitioner.	)	

TRANSCRIPT OF PROCEEDINGS

Tuesday, March 4, 2003

The Honorable J. Steven Stafford, Judge

SHEILA MEACHAM, CCR
Certified Court Reporter
P. O. Box 218285
Nashville, TN 37221-8285
(615) 646-4472

[2] APPEARANCES:

For The Petitioner:
(Via Telephone)

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(Via Telephone)	William A. Cohn attorney At Law The Cohn Law Firm 291 Germantown Bend Cove Cordova, Tennessee 38016 Phone: (901) 757-5557
For The Respondent:	Jesse D. Joseph Attorney At Law Board of Professional Responsibility for the Supreme Court of Tennessee 1101 Kermit Drive, Suite 730 Nashville, Tennessee 37217 Phone: (615) 361-7500

[3] (The following ruling was rendered via telephone conference call by the Honorable J. Steven Stafford as a result of a hearing that was held on the 30th day of October 2002 after being taken under advisement, beginning at approximately 9:00 a.m.)

MR. JOSEPH: Hi. This is Jesse Joseph.

THE CLERK: Yes, Mr. Joseph. I am going to get David Siegel on the line.

MR. JOSEPH: Okay.

THE CLERK: Mr. Cohn will be joining him.

MR. JOSEPH: Okay. Are you going – Okay. Before we get underway or when we get underway, I want to get Mr. Siegel's mailing address and phone number because I don't have their current mailing address and phone number for my record.

THE CLERK: Okay. All right. Hold on and I will get the rest of the parties.

THE COURT: Hello.

MR. JOSEPH: Yes. Good morning, Your Honor.

[4] THE COURT: We got everybody?

MR. COHN: I think so.

THE COURT: Okay. We got a court reporter?

MR. JOSEPH: Yes, Your Honor, I do have a court reporter.

THE COURT: Okay. Can she hear me okay?

THE REPORTER: Yes, sir.

MR. JOSEPH: Yes, sir, she can.

THE COURT: Wonderful. I've got a something, I don't know, the cold, the flu, or something so I sound like a frog, but that's all right. If you have any problem hearing, stop me so we can be sure and get everything down correctly.

First of all, I want to tell counsel and Mr. Cohn as well I appreciate you indulging me in this matter. It has taken significantly longer than I thought it would to get to this point. Unfortunately, I did not realize the volume of material I would be going through. This is normally not the case, but this banker's box full of material somewhat overwhelmed me as did all the transcripts and everything else I had to go [5] through. But anyway, I appreciate y'all bearing with me through the process.

It is my understanding that I am required pursuant to Rule 9, Section 1.3 to make some findings of fact and conclusions of law in this matter, and I will attempt to do

that. I don't know if they will be as concise or as specific as you want, but I will attempt to do so there was well.

This matter arose as a result of the findings of a hearing panel that was filed for record from my review on I believe April 24, 2002. At that time the hearing panel essentially issued a censure to Mr. Cohn and required him to disgorge certain monies to the – to his former clients. It also did something that I think it's called an automatic suspension in the event that he did not make the payments as he was required to prior in the Order.

As a result of that, both the Board of Professional Responsibility and Mr. Cohn appealed or filed a Petition for Writ of Certiorari with the Shelby County Court. I then was designated by the Supreme Court to hear this matter. We I believe on October – excuse me – [6] October 30th of 2002 I came to Memphis and heard the closing arguments of both counsel in this matter. No new proof was introduced by either side that the hearing panel did not, in fact, consider. I then undertook to review the record and that's where we are today.

MR. COHN: Excuse me, Your Honor.

THE COURT: Yes.

MR. COHN: I don't mean to interrupt you, but there was a deposition taken afterwards of an expert witness.

THE COURT: That's right. Mr. Rothchild, I'm sorry. That was taken by stipulation of the parties.

MR. COHN: Correct.

THE COURT: Right. I'm sorry. You are correct there.

THE REPORTER: Was that Mr. Spiegel?

THE COURT: Do what?

THE REPORTER: Was that Mr. Spiegel that just interrupted?

MR. COHN: Cohn

THE COURT: All right. As I said the Tennessee Supreme Court Rule 9, Section 1.3 provides that the Respondent or the Board may have [7] a review of the judgment of a hearing committee in the manner provided by T.C.A. Section 27-9-101 et seq. except as otherwise provided herein. The review shall be on the transcript of the evidence before the hearing committee, it's findings and judgment, and upon such other proof as either party may desire to introduce. The trial judge shall weigh the evidence and determine the facts upon – or by the preponderance of the proof.

In doing my research I came across two cases that are of specific interest to me in this matter. One is *Cannon versus Board of Professional Responsibility*. It is cited at 671 S.W.2d 835. In it the Court through Chief Justice Drowota said essentially in looking at the statement that I just made that the trial judge based his decision on the same evidence that was before the hearing committee unless the evidence preponderates against the findings by the committee, the trial judge erred in reversing the hearing panel's recommendations. In accord with that is the case of – let's see – McKinney – excuse me – *The Board verses* [sic] *James R. McKinney*, 668 S.W.2d 293, again a decision authored by Justice Drowota. So unless the

evidence [8] preponderates against the hearing panel's decision, the trial court is essentially not to tamper with it.

In this case the Court has reviewed all of the evidence and essentially here's the way I understand things. Mr. Cohn has been a practitioner for 20-plus years. During that period of time he has practiced both Chapter 7 and Chapter 13 bankruptcy law. He has been certified at some point in his career according to the certifying authorities as a specialist in the bankruptcy area. He no longer is certified, however.

In the early 1990's Mr. Cohn began a process whereby he would file post-confirmation proof of claims pursuant to Section 1305 of the Bankruptcy Code in an effort to collect attorney fees that he had expended post-confirmation.

It is evident from a review of the record and the transcript that the Chapter 13 Trustee was aware of this procedure during the early 1990s. That is indicated by essentially that transcripts of the proceedings as well as the deposition of the Chapter 13 Trustee George Stevenson. According to Mr. Stevenson at that [9] point in time he had some concerns about a criminal investigation that he thought might be going on. But as a result of his becoming aware of this, he contacted some of Mr. Cohn's clients and talked to them about this process. And he wrote at least one and maybe two letters to the U.S. Trustee seeking guidance on what he should do about Mr. Cohn filing these proof of claims for post-confirmation attorney fees according to – pursuant to Section 1305.

Excuse me one minute. I need to get something to drink.

Nothing happened as a result of Mr. Stevenson contacting the U.S. Trustee. In essence he never received any guidance from the U.S. Trustee and Mr. Cohn continued to file these proof of claims until such time as it came to a head when Judge Brown began the process of hearings in the case of *In Re Phillips*. Of course, *In Re Phillips* is the case that Judge Brown wrote that clarified how proof – or how attorney's fees must be collected in Chapter 13 cases.

Excuse me a second. Okay. Judge Brown had held several hearings regarding several [10] of these debtors. The hearings were participated in by Mr. Stevenson, Mr. Emerson, Mr. Cohn, and Judge Brown issued a couple of orders. One is the case of *In Re Phillips*, and one was a subsequent order where some agreement was reached regarding the disgorgement of certain attorney's fees by Mr. Cohn. That then led to this process where a Complaint was filed, a hearing panel held – heard the matter and then rendered their opinion.

Now, based upon all the proof, the Court finds essentially as follows: The decision of the hearing panel should be affirmed, but it should be modified in some degree, because there are some problems with that. Essentially, the Court is finding that, number one, Mr. Cohn should be publicly censured because of his activity. Number two, he should be required to disgorge all attorney's fees that have been paid post-confirmation by the listed debtors that have not already been paid. And I think that's some $13,299 according to my calculations. Gentlemen, y'all can recalculate that and let me know if that's right. This must be done within 60 days from the entry of the Order in this case unless it is stayed by an appropriate appellate court order. [11] These fees are to be paid to the Bankruptcy

Court Clerk. As far as I'm concerned, the proper procedure then is unless Mr. Cohn files a request for attorney's fees according to the proper procedure set out in *In Re Phillips*, they're to be returned to the debtors.

The issue of a suspension in this case was mentioned in the hearing panel order. I think the method that they attempted to implement a suspension is improper and is not something that can be done according to law the way they attempted to do that. The Board has suggested or the Board has asserted that Mr. Cohn should be suspended because of his activity in this case. I have carefully considered these factors and have determined that a suspension is not appropriate.

And the reason for that is this: I'm looking at the factors here. First of all, the factors that would militate in favor of a suspension would be that the Bankruptcy Code has set out a procedure that allows attorneys to be compensated for additional work. The Bankruptcy Code has always said what it said pursuant to Section 330, and Mr. Cohn didn't follow that. Additionally, Mr. Cohn was certified in two [12] different specialties and was a long time practitioner of the Bankruptcy Court and should have known what the law was.

And the mitigating factors are as follows: And I think they outweigh what I consider to be the factors favoring suspension. First of all, Mr. Cohn did not attempt to hide or in any way act surreptitiously the process that he was utilizing to collect his post-confirmation fees. For instance, he filed his proof of claim. The Chapter 13 Trustee was aware of this. The Chapter 13 Trustee even wrote the U.S. Trustee for guidance on this matter and neither the U.S.

Trustee nor the Chapter 13 Trustee ever took any action to tell Mr. Cohn that this was wrong or say this is not the right procedure until such time as the proceedings giving rise to *In Re Phillips* started which led to Judge Brown clarifying the law in this area.

Chapter 13 went as far as to talk to some of Mr. Cohn's clients but took absolutely no action to let Mr. Cohn know that this procedure was not the approved procedure. If the Chapter 13 Trustee had taken some action, then the Court's finding may very well have been different on this [13] particular issue.

Just a second. Additionally, although Mr. Cohn I don't think would be successful, he does make a plausible argument about the way the Bankruptcy Court works and about making some kind of argument that a good faith extension of the law should be allowed in this matter. I don't think – as I say, it's plausible, but I don't think there was any intent on Mr. Cohn has been shown – shown by anyone to violate the law.

He did what he did, that being filing the proof of claims under Section 1305, he did that by filing the claims in Bankruptcy Court, the Chapter 13 Trustee was aware of it. The U.S. Trustee was aware of it, and I think that the proof basically showed that his clients were aware of it. Now, that doesn't make it right, but I don't think there was any intent hereto hide anything.

And it could have been simply solved a long time ago if the Bankruptcy Trustee would have simply objected to the claim. I think Judge Brown put it quite succinctly when he said that not only Mr. Cohn but the Chapter 13 Trustee and [14] the Court to some degree bears some responsibility for this problem.

Also the Court is relying upon the case of – just one second *Board of Professional Responsibility versus Bonnington*, 762 S.W.2d 568, that is an opinion authored by Judge Fones or Justice Fones of the Supreme Court. Justice Fones states on Page I believe 570 in that case that and I quote: In our view the objective of achieving uniformity of punishment in disciplinary proceedings does not require that every named defense be accorded identical punishment. Like murder in the first degree, lawyer misappropriation of funds is subject to more than one punishment.

I don't think Mr. Cohn is entitled to those attorney's fees at this point in time. I think perhaps the Bankruptcy Court may determine he's entitled to some or may determine that he's entitled to none of them, but that's not my decision. My decision is that these fees should be disgorged and paid into the Bankruptcy Court and then that determination should be made.

Anything else, gentlemen?

MR. COHN: Your Honor, could I ask a [15] point of clarification?

THE COURT: Yes.

MR. COHN: Now, you had mentioned the attorney's fees post-confirmation Chapter 13 Court be repaid. There are two different things there. One is the $2300 which was the subject of *In Re Phillips* has been repaid.

THE COURT: Right.

MR. COHN: And then there was the closed cases which were not part of the – of this –

THE COURT: That's the $13,000.

MR. COHN: That's correct.

THE COURT: That's what I'm addressing.

MR. COHN: Okay. Which – which those – those weren't – the proof showed that those were not post-confirmation fees for bankruptcy work.

MR. JOSEPH: Your Honor, I don't – Excuse me. This is Mr. Joseph. I don't think we should argue the case and what the proof showed. I take a different prospective of what the proof showed on that and I think we need to ask Your Honor to clarify Your Honor's decision but not [16] engage in any argument as to what the proof showed.

THE COURT: Are y'all having fun?

MR. COHN: No, sir.

THE COURT: Okay. Here's – I'm ordering that $13,000 to be repaid and if – if Judge Brown decides that you're entitled to them, that's fine. If he decides that the debtors are entitled to them, that's fine. That's all I'm ordering.

MR. COHN: So if we file a petition, is it fair to ask that this be stayed until he can hear that?

THE COURT: I don't have any authority to stay this.

MR. COHN: Okay.

THE COURT: What I'm saying is when the Order goes down, if you want to ask the Supreme Court to stay this pending that determination, that's fine with me.

I have no objection to it. I think that's the proper procedure.

MR. JOSEPH: I agree, Your Honor.

MR. COHN: Okay.

THE COURT: That's why I said when I [17] was making my ruling that this is what I'm ordering to be done within 60 days unless stayed by the appropriate appellate court.

MR. COHN: Okay.

THE COURT: All right?

MR. JOSEPH: Your Honor, for clarification purposes, we'd just like to reflect that according to our calculations that specific sum would be $13,996.73.

THE COURT: Okay. Whatever the figure shows, if y'all can't determine the figure, I'll be happy to determine it but –

MR. COHN: What was it? 13,000 and what?

MR. SPIEGEL: 996.73

MR. COHN: Thank you.

MR. JOSEPH: Your Honor, one final thing, and that is the question of costs.

THE COURT: Yes, sir. Mr. Cohn is required to pay the costs according to the hearing panel. I see no need to tinker with that.

MR. JOSEPH: Thank you, Your Honor.

THE COURT: Anything else, gentlemen?

MR. JOSEPH: I will prepare a judgment, an Order in accordance with Your Honor's [18] findings and forward it to Your Honor. Is that Your Honor's desire?

THE COURT: Yes, please.

MR. JOSEPH: Would Your Honor have me attach this transcript to Your Honor's findings?

THE COURT: I think the transcript is going to have to be prepared in any event.

MR. JOSEPH: Yes, Your Honor.

THE COURT: The finding of fact and conclusions of law I – it's not necessary for my purposes for you to wait on the transcript. You can if you want to, but I think it's got to be part of the record nonetheless.

MR. JOSEPH: Yes, Your Honor.

THE COURT: Anything else?

MR. COHN: I guess will we be furnished a copy of that transcript then?

THE COURT: It's going to be part of the record.

MR. COHN: Mr. Joseph, if you could furnish, I'll be glad to pay for that if you could send me a copy of that I'd appreciate it.

MR. JOSEPH: Mr. Cohn, this is what I plan to do. If, in fact, our court reporter and this hasn't taken an exceedingly long period of [19] time, if she's able to get the transcript to me within the next five days or so, I will probably just attach a xerox copy for Your Honor and for you, just for your records and file the original of the transcript with the Clerk and Master.

THE COURT: That's fine. That's fine.

MR. COHN: That will be great.

THE COURT: Now, let me ask one question, Mr. Joseph –

MR. JOSEPH: Yes, sir.

THE COURT: – and make sure I'm clear on something. And first of all, let me thank you for providing this material to me. It's been extremely helpful. Do you want me to return this to you or am I free to dispose of it?

MR. JOSEPH: Your Honor, I would suggest out of an abundance of caution, because we've all seen our own set of horror stories over the years about cases, that if Your Honor would not mind holding on to that material?

THE COURT: No. I'd be happy to do that. In fact, I intended to do that. I just whenever this matter is concluded I'm assuming you don't want it back?

[20] MR. JOSEPH: Sure. Until such time as – you can send it to me once we get a conclusive Tennessee Supreme Court Order, if, in fact, the matter is going to be reviewed at that level, but if, in fact, the Court were to remand or –

THE COURT: Right.

MR. JOSEPH: – or somehow send the matter back to Your Honor –

THE COURT: I'll just hold it then.

MR. JOSEPH: I – I would think so, Your Honor, if Your Honor doesn't mind.

THE COURT: But you want it back; is that – is that correct?

MR. JOSEPH: No, Your Honor. Once the matter is concluded by the Tennessee Supreme Court, we already have –

THE COURT: Okay.

MR. JOSEPH: – the whole file here. We – Your Honor can dispose of it as you deem appropriate.

THE COURT: Okay. That's what I'm trying to figure out whether you wanted it back or not.

MR. JOSEPH: All right.

[21] THE COURT: All right, guys. I appreciate it. Y'all have a good day.

MR. JOSEPH: Thank you very much, Your Honor.

(Proceedings concluded at 9:25 A.M.)

[22] REPORTER'S CERTIFICATE

STATE OF TENNESSEE)
)
COUNTY OF DAVIDSON)

I, SHEILA W. MEACHAM, Certified Court Reporter, hereby certify that I reported the foregoing proceedings at the time and place set forth in the caption thereof; that the proceedings were stenographically reported by me; and that the foregoing proceedings constitute a true and correct transcript of said proceedings to the best of my ability.

I FURTHER CERTIFY that I am not related to any of the parties named herein, nor their counsel, and have no interest, financial or otherwise, in the outcome or events of this action.

IN WITNESS WHEREOF, I have hereunto affixed my official signature and seal of office this 6th day of March, 2003.

SHEILA W. MEACHAM, CERTIFIED
COURT REPORTER AND NOTARY
PUBLIC FOR THE STATE
OF TENNESSEE AT LARGE

My Commission Expires:
January 29, 2005

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

WILLIAM A. COHN v.
BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE SUPREME COURT OF TENNESSEE

Chancery Court for Shelby County
No. CH-02-1099-1

W2003-01516-SC-R3-CV

ORDER

(Filed Jan. 13, 2005)

The appellant, William A. Cohn, has filed a motion for stay of enforcement of the judgment and stay of the mandate pursuant to Tenn. R. App. P. 42. We have considered all of the arguments raised in the memorandum in support of the motion and we have found them to be without merit.

After due consideration, it is **ORDERED** that the motion for stay of enforcement of the judgment and stay of the mandate is denied.

PER CURIAM

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11 U.S.C. § 1305 provides in full:

Filing and allowance of post-petition claims.

(a) A proof of claim may be filed by any entity that holds a claim against the debtor –

(1) for taxes that become payable to a governmental unit while the case is pending; or

(2) that is a consumer debt, that arises after the date of the order for relief under this chapter, and that is for property or services necessary for the debtor's performance under the plan.

(b) Except as provided in subsection (c) of this section, a claim filed under subsection (a) of this section shall be allowed or disallowed under section 502 of this title, but shall be determined as of the date such claim arises, and shall be allowed under section 502(a), 502(b), or 502(c) of this title, or disallowed under section 502(d) or 502(e) of this title, the same as if such claim had arisen before the date of the filing of the petition

(c) A claim filed under subsection (a)(2) of this section shall be disallowed if the holder of such claim knew or should have known that prior approval by the trustee of the debtor's incurring the obligation was practicable and was not obtained.

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11 U.S.C. § 329 provides in full:

(a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year

before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to –

(1) the estate, if the property transferred –

(A) would have been property of the estate; or

(B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or

(2) the entity that made such payment.

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11 U.S.C. § 330 provides in full:

(a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103 –

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the

estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

(3)(A) In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including –

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and

(E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

(4)(A) Except as provided in subparagraph (B), the court shall not allow compensation for –

(i) unnecessary duplication of services; or

(ii) services that were not – (I) reasonably likely to benefit the debtor's estate; or (II) necessary to the administration of the case.

(B) In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of

the benefit and necessity of such services to the debtor and the other factors set forth in this section.

(5) The court shall reduce the amount of compensation awarded under this section by the amount of any interim compensation awarded under section 331, and, if the amount of such interim compensation exceeds the amount of compensation awarded under this section, may order the return of the excess to the estate.

(6) Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application.

(b)(1) There shall be paid from the filing fee in a case under chapter 7 of this title $45 to the trustee serving in such case, after such trustee's services are rendered.

(2) The Judicial Conference of the United States –

(A) shall prescribe additional fees of the same kind as prescribed under section 1914(b) of title 28; and

(B) may prescribe notice of appearance fees and fees charged against distributions in cases under this title; to pay $15 to trustees serving in cases after such trustees' services are rendered. Beginning 1 year after the date of the enactment of the Bankruptcy Reform Act of 1994, such $15 shall be paid in addition to the amount paid under paragraph (1).

(c) Unless the court orders otherwise, in a case under chapter 12 or 13 of this title the compensation paid to the trustee serving in the case shall not be less than $5 per month from any distribution under the plan during the administration of the plan.

(d) In a case in which the United States trustee serves as trustee, the compensation of the trustee under this section shall be paid to the clerk of the bankruptcy court and deposited by the clerk into the United States Trustee System Fund established by section 589a of title 28.

Excerpts from Rule 8, Rules of the Supreme Court:

DR 1-102. Misconduct. –

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(2) Circumvent a Disciplinary Rule through actions of another

(3) Engage in illegal conduct involving moral turpitude

(4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

(7) Wilfully refuse to comply with a court order entered in a case in which the lawyer is a party.

DR 2-106. Fees for Legal Services. –

(A) A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

(C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

DR 7-101. Representing a Client Zealously. –

(A)(1) A lawyer shall act with reasonable diligence and promptness in representing a client.

(2) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for communication or information.

(3) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(4) A lawyer shall not intentionally:

(a) Fail to seek the lawful objectives of the client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of the client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(b) Fail to carry out a contract of employment entered into with a client for professional services, but a lawyer may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105.

(c) Prejudice or damage the client during the course of the professional relationship, except as is required under DR 7-102(B).

(B) In the representation of a client, a lawyer may:

(1) Where permissible, exercise professional judgment to waive or fail to assert a right or position of the client.

(2) Refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is

some support for an argument that the conduct is legal.

DR 7-102. Representing a Client Within the Bounds of the Law. –

(A) In the representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

(3) Conceal or knowingly fail to disclose that which the lawyer is required by law to reveal.

(4) Knowingly use perjured testimony or false evidence.

(5) Knowingly make a false statement of law or fact.

(6) Participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false.

(7) Counsel or assist the client in conduct that the lawyer knows to be illegal or fraudulent.

(8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

(B) A lawyer who receives information clearly establishing that:

(1) The lawyer's client has, in the course of the representation, perpetrated a fraud upon a person or tribunal, shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

(2) A person other than the client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

DR 7-106. Trial Conduct. –

(A) A lawyer shall not disregard or advise the client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but may take appropriate steps in good faith to test the validity of such rule or ruling.

(B) In presenting a matter to a tribunal, a lawyer shall disclose:

(1) Legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and which is not disclosed by opposing counsel.

(2) Unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.

(C) In appearing in a professional capacity before a tribunal, a lawyer shall not:

(1) State or allude to any matter that the lawyer has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

(2) Ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.

(3) Assert the lawyer's personal knowledge of the facts in issue, except when testifying as a witness.

(4) Assert the lawyer's personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but a lawyer may argue, on the lawyer's analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

(5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of an intent not to comply.

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

(7) Intentionally or habitually violate any established rule of procedure or of evidence.